

PROFILING OF VALID AVAILABLE GROUNDS
TO CLAIM EXTENSION OF TIME IN CONSTRUCTION INDUSTRY

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DEDICATION

This thesis is dedicated to my father, who taught me that the best kind of knowledge to have is that which is learned for its own sake. It is also dedicated to my mother, who taught me that even the largest task can be accomplished if it is done one step at a time.

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ABSTRACT

Construction projects have become increasingly complex and are subject to various risks, thus delays or extension of time to construction project become a popular issue in construction industry. In Malaysian Standard Forms of Contract PAM 2006, the lists of relevant events are provided to allow the construction parties to claim for extension of time. The contractors carry a burden of proof to establish with credible evidence in order to prove his entitlement to the claims. However, a lack of knowledge amongst the construction parties is the main reason of failure to prepare detailed supporting information and poor quality of documentations. It renders the extension of time claims becoming fatal. Therefore, this study aims to establish an available grounds to claim extension of time in construction industry, such as employer late issuing the architect's instruction, late giving site possession by the employer, delay caused by Force Majeure events, delay caused by any appropriate authority and service provider in carrying out, main contractor failure to provide the necessary document and information, act of prevention or breach of contract by the employer, and delay or failure on the part of the sub-contractor to execute such work. Furthermore, this research is carried out mainly through documentary analysis of law journals. The data needed for this research is obtained via LexisNexis Malaysia which is Malayan Law Journal. Only 15 cases are related with the scope of the research. However, there are some of the grounds that available for claim the extension of time in construction industry. The judgment of each of the cases is analysed in order to find out either the application is successful or unsuccessful. This research also highlighted the construction parties involved in the cases and level of court interfere in the case. Hence, the finding of this research will provide a guideline for the construction players in future. This research will act as reference for them who need application for claim extension of time in Malaysian construction industry.

ABSTRAK

Projek pembinaan menjadi semakin rumit dan menghadapi pelbagai risiko, oleh itu kelewatan atau perpanjangan masa untuk projek pembinaan menjadi isu yang popular dalam industri pembinaan. Dalam Kontrak Malaysia PAM 2006, senarai peristiwa yang berkaitan disediakan untuk membolehkan pesta pembinaan menuntut lanjutan masa. Pesta pembinaan membawa bebanan bukti untuk membuktikan dengan dokumen yang boleh dipercayai untuk membuktikan haknya terhadap tuntutan tersebut. Walau bagaimanapun, kekurangan pengetahuan di kalangan kontraktor adalah sebab utama kegagalan menyediakan maklumat sokongan terperinci dan kualiti dokumentasi yang buruk. Ini menjadikan pemanjangan tuntutan masa menjadi fatal. Oleh itu, kajian ini bertujuan untuk menetapkan alasan yang ada untuk menuntut perpanjangan masa dalam industri pembinaan, seperti majikan lambat mengeluarkan arahan arkitek, lambat memberikan hak milik tapak oleh majikan, kelewatan yang disebabkan oleh peristiwa Force Majeure, kelewatan yang disebabkan oleh mana-mana pihak berkuasa dan pembekal perkhidmatan yang sesuai dalam melaksanakan, kegagalan kontraktor utama untuk memberikan dokumen dan maklumat yang diperlukan, tindakan pencegahan atau pelanggaran kontrak oleh majikan, dan kelewatan atau kegagalan pihak sub-kontraktor untuk melaksanakan kerja tersebut. Selanjutnya, penyelidikan ini dilakukan terutamanya melalui analisis dokumentari jurnal undang-undang. Data yang diperlukan untuk penyelidikan ini diperoleh melalui LexisNexis Malaysia yang merupakan *Malayan Law Journal*. Hanya 15 kes yang berkaitan dengan skop kajian. Namun, ada beberapa alasan yang ada untuk menuntut perpanjangan masa dalam industri pembinaan. Keputusan setiap kes dianalisis untuk mengetahui sama ada permohonan itu berjaya atau tidak berjaya. Penyelidikan ini juga menunjukkan pihak pembinaan yang terlibat dalam kes dan tahap pengadilan campur tangan dalam kes tersebut. Oleh itu, penemuan penyelidikan ini akan memberikan garis panduan untuk pemain pembinaan pada masa akan datang. Penyelidikan ini akan berfungsi sebagai rujukan bagi mereka yang memerlukan permohonan untuk melanjutkan tuntutan dalam industri pembinaan Malaysia.

TABLE OF CONTENTS

CHAPTER	TITLE	PAGE
	DECLARATION	ii
	DEDICATION	iii
	ACKNOWLEDGEMENT	iv
	ABSTRACT	v
	ABSTRAK	vi
	TABLE OF CONTENTS	vii
	LIST OF TABLES	xii
	LIST OF FIGURES	xiii
	LIST OF CASES	xiv
	LIST OF ABBREVIATIONS	xvi
CHAPTER 1	INTRODUCTION	1
1.1	Background of Study	1
1.2	Problem Statement	4
1.3	Research Questions	7
1.4	Research Objectives	7
1.5	Scope of Research	7
1.6	Significance of Research	8

1.7	Research Methodology	8
1.7.1	Stage 1 – Identification Issues and Problem Statements	9
1.7.2	Stage 2– Literature Review	9
1.7.3	Stage 3 – Data Collection	9
1.7.4	Stage 4 – Research Analysis	10
1.7.5	Stage 5 – Conclusion and Recommendation	10
1.8	Chapter Organisation	11
CHAPTER 2	CONSTRUCTION DELAY AND EXTENSION OF TIME	13
2.1	Introduction	13
2.2	Time for Completion	13
2.2.1	Time is of the Essence	14
2.3	Construction Delays	15
2.4	Types of Delays	16
2.4.1	Compensable Delay	16
2.4.2	Excusable Delay	17
2.4.3	Non-Excusable Delay	18
2.4.4	Concurrent Delay	18
2.5	Extension of Time	19
2.5.1	Basic Principle of Extension of Time	20
2.5.2	Contract Provision for Extension of Time	21
2.5.3	Purpose of Extension of Time Clauses in Building Contract	21
2.5.4	Procedures for Claiming Extension of Time	22
2.5.5	Compliance with and confirmation of Contract Administrator’s Instruction	24
2.5.6	Identification of Justification for a Claim	25
2.5.7	Preparation and Negotiation of Claims	25
2.6	Grounds for Granting Extension of Time	26

2.6.1	Force Majeure	28
2.6.2	Exceptionally Inclement Weather Condition	29
2.6.3	Late Architect or Superintending Officer's Instructions	30
2.6.4	Delay by the Employer in giving possession of Site	31
2.6.5	Civil Commotion, Strike, Lock-Out	33
2.6.6	Delay Caused by any Appropriate Authority	33
2.6.7	Act of Prevention or breach of contract by Employer	34
2.6.8	Delay caused by the part of sub-contractor	35
2.7	Conclusion	36
 CHAPTER 3 RESEARCH METHODOLOGY		 37
3.1	Introduction	37
3.2	Research Methodology	38
3.2.1	Stage 1: Initial Study	38
3.2.2	Stage 2: Data Collection	39
3.2.3	Stage 3: Data Analysis	42
3.2.4	Stage 4: Writing-up, Profiling and Completion	42
3.3	Conclusion	42
 CHAPTER 4 AVAILABLE GROUNDS TO CLAIM EXTENSION OF TIME		 44
4.1	Introduction	44
4.2	Analysis of Cases	44
4.2.1	Platinum Nanochem Sdn Bhd V Mecpro Heavy Engineering Ltd [2016] 11 MLJ 141	45
4.2.2	Daya Cmt Sdn Bhd V Yuk Tung Construction Sdn Bhd [2018] MLJU 871	48
4.2.3	DC Contractor Sdn Bhd V Universiti Pertahanan Nasional Malaysia [2014] 11 MLJ 633	51
4.2.4	Juta Damai Sdn Bhd V Permodalan Negeri Selangor [2014]	

MLJU 723	54
425 Green Nurture Sdn Bhd V Wing Onn Engineering Sdn Bhd [2015] 9 MLJ 39	56
426 Geopancar Sdn Bhd V Visage Engineering Sdn Bhd [2013] 4 MLJ 37	59
427 HLM Sdn Bhd V Uda Land (South) Sdn Bhd [2010] 9 MLJ 759	62
428 Top Speed Holding Sdn Bhd V Conlay Constuction Sdn Bhd [2011] MLJU 121	65
429 Hoo Hee Lai @ Ho Hee Lai & Anor V Tan Cheow Yen [2018] MLJU 1083	68
42.10 Ms Elevators Engineering Sdn Bhd V Jasmurni Construction Sdn Bhd [2018] MLJU 1082	71
42.11 Kris Heavy Engineering & Construction Sdn. Bhd. V Abb Industrial Contracting Sdn. Bhd [2015] MLJU 1009	74
42.12 Goldcourse Sdn Bhd V Asaztera Sdn Bhd [2011] 9 MLJU 700	77
42.13 Pkns Engineering & Construction Bhd V Global Interdream (M) Sdn Bhd [2014] 5 MLJU 206	80
42.14 Jeks Engineering Sdn Bhd V Pali Ptp Sdn Bhd [2019] MLJU 1029	83
42.15 Bakti Dinamik Sdn Bhd V Bauer (M) Sdn Bhd [2016] MLJU 1878	86
4.3 Parties Involved in the Case	89
4.4 Level of Court Assistance	93
4.5 Issue and Summary of Relevant Judgment	96
4.6 Determining Valid Available Grounds to Claim the Extension of Time Based on Case Analysis	102
4.7 Number of Ground Used when Applying to the Court	104
4.8 Successful and Unsuccessful Cases	105

4.9 Summary of Cases	108
CHAPTER 5 CONCLUSION & RECOMMENDATION	115
5.1 Introduction	115
5.2 Summary of Research Findings	116
5.3 Problem Encountered	116
5.4 Future Research	116
5.5 Conclusion	117
<i>REFERENCES</i>	118
<i>APPENDIX</i>	

LIST OF TABLES

TABLE NO.	TITLE	PAGE
Table 2.1	Relevant Events between PAM 2006	27
Table 3.1	List of 15 Cases Retrieved from Search Term	41
Table 4.1	Party Involved in the case	90
Table 4.2	Summary of Level of Court Assistance	93
Table 4.3	Example Repeated Header Table	97
Table 4.4	Determining Valid Available Ground to Claim the Extension of Time	102
Table 4.5	The Court Decision either Successful or Unsuccessful	105
Table 4.6	Summary of Cases	114

LIST OF FIGURES

FIGURE NO.	TITLE	PAGE
Figure 1.1	Research Process and Methods of Approach	12
Figure 3.1	Process of Finalising Number of Cases Needed	40
Figure 3.2	Framework of Research Methodology	43
Figure 4.1	Summary of the Parties Involved in the Case	92
Figure 4.2	Percentage of Case According to Level of Court Assistance	95
Figure 4.3	Number of Case According to Number of Ground Used When Applying to Court for Claim Extension of Time	104
Figure 4.4	Number of Successful and Unsuccessful	108

LIST OF ABBREVIATIONS

CIDB	-	Construction Industry Development Board
CIOB	-	Chartered Institute of Building
CPM	-	Critical Path Method
EOT	-	Extension of Time
PAM	-	Pertubuhan Artitek Malaysia
QS	-	Quantity Surveyor
UTM	-	Universiti Teknologi Malaysia
SO	-	Superintending Officer
AI	-	Architect's Instruction

LIST OF CASES

CASE	PAGE
Asia Pacific Resources Pty Ltd v Forestry Tasmania [1998] R 90-095	32
Bakti Dinamik Sdn Bhd V Bauer (M) Sdn Bhd [2016] MJu 1878	92
Berjaya Times Squares Sdn Bhd v M Concept Sdn Bhd [2010] 1 MLJ 597	15
Bremer Handelgesellschaft mbh v Vanden Avenne-Izegem [1978] 2 Lloyd's Rep 109	25
City Inn Ltd v Shepherd Construction Ltd [2002] SLT 781	5
Codelfa Construction Party Ltd v State Rail Authority of New South Wales [1982] 149 CLR 337	19
Daya Cmt Sdn Bhd V Yuk Tung Construction Sdn Bhd [2018] MLJU 871	53
DC Contractor Sdn Bhd v Universiti Pertahanan Nasional Malaysia [2014] 11 MLJ 633	17, 56

Dodd v Churton [1897] 1 QB 562	24, 39
Farrer v. Close (1869) LR 4 QB 602	37
Falklands Islands v Gordon Forbes Construction (Falklands) Ltd [2003] 6 BLR 280	25
Freeman v Hensler [1900] 64 JP 260	36
Geopancar Sdn Bhd V Visage Engineering Sdn Bhd [2013] 4 MLJ 37	24, 64
Global Upline Sdn Bhd v Kerajaan Malaysia [2016] 8 MLJ 441	15 83
Goldcourse Sdn Bhd V Asaztera Sdn Bhd [2011] 9 MLJ 700	
Green Nurture Sdn Bhd V Wing Onn Engineering Sdn Bhd [2015] 9 MLJ 39	61
HLM Sdn Bhd v UDA Land (South) Sdn Bhd [2010] 9 MLJ 759	23, 67
Hoo Hee Lai @ Ho Hee Lai & Anor V Tan Cheow Yen [2018] MLJU 1083	73
Holme v Guppy [1838] 3 M&W 387	36
Jeks Engineering Sdn Bhd V Pali Ptp Sdn Bhd [2019] MLJU 1029	89

Juta Damai Sdn Bhd V Permodalan Negeri Selangor Berhad [2014] MLJU 723	59
Kris Heavy Engineering & Construction Sdn. Bhd. V Abb Industrial Contracting Sdn. Bhd [2015] MLJU 1009	80
Leaupin v Crispin [1920] 2 KB 714 at 719	32
Loke Yuen Cheng & Anor v Vimtex Sdn Bhd [1998] 4 MLJ 169	16
Malaysia Land Properties Sdn Bhd v Tan Peng Foo [2012] MLJU 1219	32
Ms Elevators Engineering Sdn Bhd V Jasmurni Construction Sdn Bhd [2018] MLJU 1082	76
Neodox Ltd v Swinton and Pendlebury Borough Council [1958] 5 BLR 34	35
Opat Decorating Service (Aiist) Pty Ltd v Hansen Yuncken (SA) Pty Ltd [1994] 11 BCL 360	5
Pacific Coast Construction Co. Ltd. v Greater Vancouver Regional Hospital [1986] 23 CLR 35	21
Perini v Commonwealth [1969] 2 NSW 530	22
Perini Pacific Ltd v Great Vancouver Sewerage and Drainage District [1967] S.C.R. 189	3

PKNS Engineering & Construction Bhd V Global Interdream (M) Sdn Bhd [2014] 5 MLJ 206	86
Platinum Nanochem Sdn Bhd v Mecpro Heavy Engineering Ltd [2016] MLJU 98	50
Top Speed Holding Sdn Bhd V Conlay Constuction Sdn Bhd [2011] MLJU 121	70
Westminster City Council v. Jarvis & Sons Ltd [1970] 1 All ER 943	40

CHAPTER 1

INTRODUCTION

1.1 Background of the Study

The construction industry is the one of the most dynamic and responsive sectors in the industry. It has also highly visible output and stimulates sizeable amount of economic growth through inter sectorial linkages between construction and other sectors, which makes construction sector powerful in the economy (Serdar Durdyer, 2012).

All construction projects are unique and carry their own risks. Such projects involve a number of parties concerned, involved with the employer, contractor, designer, suppliers, and others. All parties involved in a project inevitably carry certain risks. The risk can be defined as a difference of actual and expected results. The process of risk management usually consists of four stages: risk identification, risk analysis, selection of risk management technique and monitoring of the management of risk consequences. According to Aurelija Peckiene (2013), construction project shall start with signing of a contract between employer and contractor for carrying out construction works. The purpose of a construction contract agreement is to allocate rights, duties, responsibilities and risks between the parties.

The construction risk as a variable in the construction process whose variation results in uncertainty as to the final cost, duration and quality of the project. According to H.A.Odeyinka (2006), risk in construction has been the object of attention because of time and cost overruns associated with construction projects. Project cost overruns

are attributable to either unforeseen or foreseen events for which uncertainty was not appropriately accommodated. It also identified an effect of risk on construction projects as failure to achieve the required quality and operational requirements.

Thus, construction projects have become more and more complicated. They are subjected to various risks and uncertainties, such as inclement weather conditions, soil conditions, the availability of resources and requirements by the employer, thus delays to construction project become an unavoidable issue. An employer thus imposes liquidated damages for contractor's failure to achieve the agreed completion date as a result of delaying circumstances (Haidar, 2011).

The delaying circumstances can be classified into two major kinds which are excusable events and non-excusable events. An excusable event is the event that beyond contractor's control and it is excused under the contract from meeting an agreed completion date, for which the contractor is therefore entitled to receive an extension of time (Azmi, 2014). Generally, the excusable events include variation orders, design problems and imposition of site restrictions. On the other hand, the non-excusable event is caused by contractor's actions or inactions. In these events, the contractor is most properly facing loss of entitlement to the extension of time. The non-excusable events, for example the contractor failed to complete work within the stipulated completion period, poor work coordination and lack of manpower or machineries (Hackett, 2000).

A contractor normally has an obligation to complete a project before or by a certain completion. If an employer prevents a contractor from executing his performance by the limited completion date, the contractor is no longer obliged to complete the works within the stipulated date. Nevertheless, contractor has to complete the construction works within a reasonable and fair time (Davenport, 2013). With reference to the case of *Perini Pacific Ltd v Great Vancouver Sewerage and Drainage District*, if the performance of a party was rendered impossible to be performed by the wrongful act of another party, it caused a contracting party was released from continual performance of a contract.

Consequently, most of the construction contracts specify the extension of time provisions in respect of acts of prevention by the employer in order to avoid the impact of the prevention principle. The provision of extension of time clause in the contract is actually to be more benefit for the employer than the contractor. It is because it preserves the entitlement of an employer to demand liquidated damages if the contractor fails to meet the completion date due to acts of prevention by employer (Abbott, 2015).

With reference to Pertubuhan Artitek Malaysia (PAM) standard form of building contract PAM 2006 which was officially launched on 05 April 2007, the extension of time provision is based on Clause 23.0. Under Clause 23.0 of PAM 2006, the obligation of the contractor was stated and it contained the list of relevant events which allowed the contractor to claim for extension of time.

Although the extension of time has been legally governed, it is not generally relevant to every particular contract term which could help to reduce the number of disputes. For example, in determining an extension of time for a delayed event, the architect is responsible to assess whether the causes of delay enable the contractor to claim extension of time under the contract and whether the contractor has used his best endeavor to prevent and reduce the consequences of the delay (David, 2011).

The project delay was affected toward the construction project. The occurrence of delay was concurrently with other delays and all of them can impact the project completion date. In delay project experiences delays in construction period where different gaps occurred between the actual progress on site work and scheduled work.

Hence, projects are failed to complete in construction period as per contract and this failure to achieve targeted time, budgeted cost and specified quality results in various negative effects (Ashwini Arun Salunkhe, 2014).

1.2 Problem Statement

Time is one the most important factor of ascertaining whether the construction project is successful or fail (Onn, 2002). In construction contract, time is referred to either the specified date or a construction completion period. It is important to all contracting parties to agree to a specified completion date for the project. Nevertheless, the mandatory of the contracting parties to perform within the contractual completion date gives rise to one of the fundamental risks of any building project, which is claiming for extension of time (Harbans, 2011).

According to Nee (2005), studies the issue of delay notification for extension of time. According to this study, delays notification is one of the crucial causes behind the claim the extension of time. In the case of *Opat Decorating Service (Aiist) Pty Ltd v Hansen Yuncken (SA) Pty Ltd*, a subcontractor claimed additional time for completing his works under the subcontract due to the delay arose. With reference to the provision of relevant clause that requested the subcontractor to submit the notice in writing and statement of the facts which he wished to claim within 14 days after the event of delay arose. The court stated that it was a mandatory provision that the subcontractor to submit the notice together with the full particulars in written forms not later than 14 days after the date of occurrence of the events. Therefore, the subcontractor had failed to comply with the provision, the court held that this was fatal to the claim.

According to Choon (2018), studies the issue of concurrent delay in an extension of time. According to this study, concurrent delay which consider as inexcusable delays caused due to solely to contractor and was not entitled to claim extension of time. For example, in case of *City Inn Ltd v Shepherd Construction Ltd*, the contractor argued that he was permitted to an extended time for 11 weeks due to the late instructions from architect. However, the employer argued that there was no extension of time should be given and the liquidated damages should be payable since the contractor had failed to comply to submit the notices and particulars within the

stipulated time. The court concluded that the architect's decision on granting the days of extension of time must be referred to the evidence that was available and the evidence must be reasonable. As a result, a valid claim must be supported by the comprehensive records and particulars in order to prove the entitlement of time.

As concluded by the cases above, according to Clause 23.1(a) of PAM 2006, it is stated that *the contractor shall provide written notice of delay to the architect in order to claim EOT together with an initial calculate of the EOT he may require supported with all particulars of the cause of delay...* and Clause 23.3 of PAM 2006 stated that *if the architect is of his opinion that the particulars submitted by the Contractor are not enough to enable him to decide on the application for EOT...*

(i) The architect owed a duty to estimate the delay and grant a reasonable extension of time when he was of his own opinion that the work progress was most likely to be delayed over the agreed completion date.

(ii) A failure to serve a notice of delay by the contractor to the architect or provide the information about the cause of delay was a factor that the architect could consider in granting the extended time.

The wording of the contract determined whether the non-submission of proper notice of delays and supporting documents or details could influence a contractor or sub-contractor losing their right to claim for extension of time (Harbans, 2007). If the contract stated that the submission of a notice and supported with all particulars was a condition precedent to claim extension of time.

Moreover, it was generally summarised that the contractors had to prove the delays events were at the risk of the employer in order to recover their rights to extension of time. Besides that, the contractor also proved the delay events affected the project completion date with the basis for providing the critical path method of scheduling (Issaka, 2008).

However, the contractor always failed to prove their entitlements to the extension of time because there was lack of evidence to demonstrate the causes or effects of the problems (Powell smith, 2012). For examples, the contractor should record delay-causing events that may have an impact on the contract work. If contractor's failure to present evidence as to the actual weather at the site and its effect towards the work, the contractor's entitlement for delay and disruption claims was denied (Khaled, 2014).

Most of the projects in Malaysia, the contractor also failed to prepare detailed information and records, especially a proper programme of works (Entrusty Group, 2006). The poor project information management decreases the opportunity of obtaining an extension of time claim of being approved by the architect or superintending officer and increases the likelihood of a disputes.

The construction parties claim for extension of time under the standard form of building contract was under the legal and burden of proof. As a result, it was important to all construction parties especially the contractor to prepare a detailed and accurate work programme record with proper connections of the activities and easily identifiable critical activities in order to prove the cause and effect of the relevant events (Najib E.S, 2014). For example, an exceptionally adverse weather claim's case of *Walter Lawrence v Commercial Union Properties*, an exceptionally inclement weather conditions allowed the contractor for claiming extension of time. The contractor had to prove that the number of rainy days encountered exceed the number of rainy days recorded in the meteorological averages. In addition to that, the contractor was also requested to prove that the nature of the construction operations directly affected by these exceptional rainfall condition.

1.3 Research Questions

The above problem statements lead to following research question as stated below:

1. What are the valid available grounds that can be used by construction parties to claim the extension of time in construction industry?

1.4 Research Objectives

Base on the highlighted research question, the research objective of this research is to identify valid available grounds to claim the extension of time in construction industry.

1.5 Scope of Research

This study focuses on the application of extension of time claim by the contractors under the Malaysian standard form of building contract which are PAM 2006.

The Research conducted will covers the following:

1. Malaysia law cases reported in Malaysia Law Journal
2. Cases only related to Malaysian construction industry

1.6 Significance of Research

This research focused on contractors in order to gain the general knowledge and a clear understanding of claims extension of time in Malaysian construction industry. Besides that, this study also provides information relative to the contractor who is unsatisfied with the decision specifically in construction industry. The findings of the research clarify the available grounds and all circumstances to the contractor in claiming the extension of time in construction industry.

In addition, this research will discuss the successful and unsuccessful circumstances regarding to the contractor claim extension of time in construction industry. Hence, these will be a useful guideline and reference for the contractors before claiming the extension of time in order for them to make a successful application to the court.

1.7 Research Methodology

A systematic research methodology needs to be carried out in order to ensure the data collected and analysis of data is in accordance with the research objectives. The research process is classified into 5 major stages, includes the identification issues and problem statements, writing up literature review, data collection, analysis of data and conclusion and recommendation.

1.7.1 Stage 1 – Identification Issues and Problem Statements

The study was initiated by searching for issues related to the construction industry through various supplements such as journals, articles and relevant court decisions. Once the particular issue had been identified, the problem statement was further discussed and analysed. Then, the research objectives were formed and followed by the scope and significance of the study.

1.7.2 Stage 2– Literature Review

The second stage of this study was literature review whereby a conceptual framework was developed. The researcher needed a lot of reading and reviewing on the literature relevant to extension of time claims in order to grasp ideas from the previous research. The reading and reviewing materials include journals, theses, articles, books, sources from website, and various standard forms of contract. It is crucial to ensure that the information gained during the literature survey is accurate and valid.

1.7.3 Stage 3 – Data Collection

The third stage of research methodology discussed the technique used to collect the data. It was to ensure the information obtained was relevant to the research objective as stated. The data related to extension of time claim in terms of interpretation of wordings and pre-requirement will be collected from previous court cases via different resources, for instances, Malaysia Law Journals, Malaysia Law Report and so on through UTM library electronic database, namely *Lexis Nexis* Legal Database.

1.7.4 Stage 4 – Research Analysis

After the data was collected, the process of analysing data was to convert the data collected into the useful information.

In order to achieve the objective in the study, the collected data from court cases have been closely examined to find out the relevant and suitable court cases. Thereafter, the court case analysis has been conducted to study the previous court cases in claiming the extension of time. It is important to find out the requirements from the judgment of the court cases because the results from court cases will be used as basis for comparative analysis later.

After that, the court cases related to the research scope have been gathered. All necessary information such as judgments, ideas, and comments have been analysed from the court cases pertaining to circumstances and grounds have been claim the extension of time. The facts and details of the cases critically review and continued with the writing up of the findings as the research outcome. The available grounds used to claim the extension of time have been highlighted in each of the cases. The grounds are profiled according to the themes provided in the literature review.

1.7.5 Stage 5 – Conclusion and Recommendation

The final stage of the research was the conclusion and recommendations made. After achieving the objective of the research, the conclusion was made. Besides that, some recommendations were made for further research purpose or proposing a better solution to overcome the similar problem arising.

1.8 Chapter Organisation

Chapter 1 provides the whole concept of the research which includes background of study, problem statement, research objectives, significance and scope of research. Chapter 2 provide a literature review about the research. Chapter 2 will clarify the definition, theory about delays and extension of time, clauses of extension of time, types of delays, and relevant events.

Chapter 3 describes the research methodology of the study. It describes how the research is carried out, instrument of the research, and techniques of data collection. Chapter 4 describes the techniques of data analysis, further this chapter involves with analyses and discusses the findings from the data collected. Chapter 5 discusses the conclusion of the research and outlines recommendations for future research.

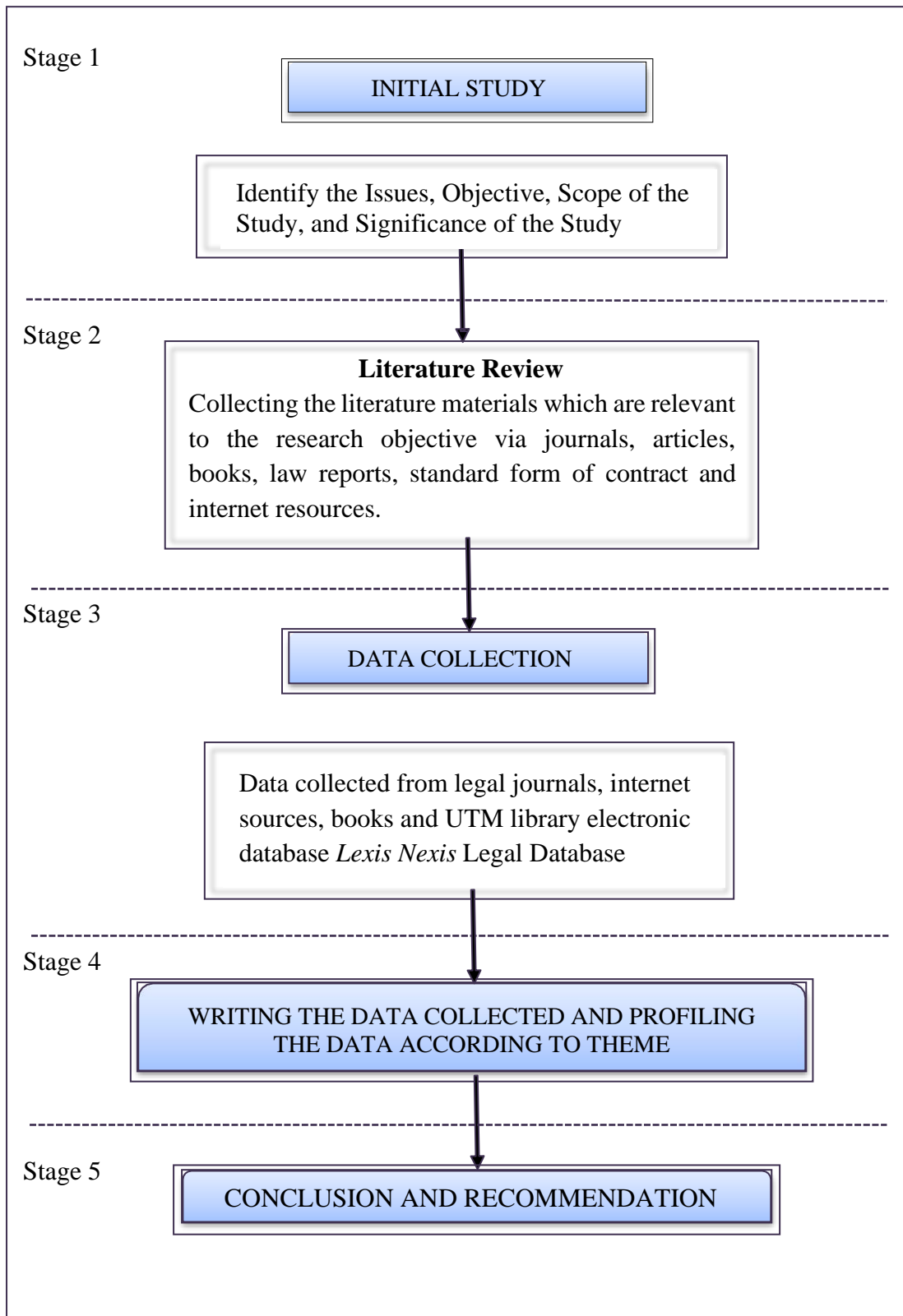


Figure 1.1: Research Process and Methods of Approach

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